IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 782 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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THAKOR DASHRATHJI GABHAJI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR CHIRAG PATEL for MR BS PATEL for Appellant(s) : 1,MRS RANJAN B PATEL for Appellant(s) : 1,

MR KT DAVE, Additional Public Prosecutor for
Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 23/11/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. The appellant – original accused has filed this appeal under Section-374 of the Criminal Procedure Code, 1973 (for short 'Code') challenging the order and judgment dated 31.7.2001 passed by the learned Additional Sessions Judge, Mehsana in the Session Case No.229 of 1997 convicting and sentencing the appellant for offence punishable under Section-376 of the Indian Penal Code with a rigorous imprisonment of 10 years and fine of Rs.3,000/- and in default thereof to undergo S.I of 1 year. The appellant – accused was also convicted for

the offence under Section-506(2) of IPC and was sentenced for R.I of 1 year and fine of Rs.1500/- and in default thereof to undergo S.I of 6 months. Both these substantive sentences were ordered to run concurrently.

2. Facts of the case have been detailed in the order and judgment of the learned Additional Sessions Judge, Mehsana and, therefore, it is not expedient to repeat the same all over again in verbatim and in detail in this judgment. However, the basic facts which are necessary to be discussed in this appeal are as under :-

3. It is the case of the prosecution that on 26.3.1997 the complaint has been registered by the complainant that the complainant is residing in hut behind Kamboinagar Society, Raopura, Mehsana. The complainant was residing with his family, he has two sons, one daughter and daughter-in-law. The

complainant and his son by occupation were labourers. It is alleged in the complaint that the complainant's daughter, victim girl, was raped by the appellant on 26.3.1997 between 11:30 a.m and 12:30 p.m. It is also alleged in the complaint that the complainant on the date of incident came to know through his daughter-in-law, namely, Bhikhiben that the victim girl was not seen in the house from 11:00 a.m onwards. The complainant and his son went for search of the victim girl. After sometime the complainant heard sound of cry from the adjoining hut. The complainant and his son entered in that hut and they saw that the complainant's daughter was crying and lying on the floor unconscious, at that time appellant run away from the tent by jumping the wall running towards Kamboinagar Society. The complainant, thereafter, asked his son to give her water and then made her sit and on inquiry made by the complainant the daughter

of the complainant said that when she was alone in the house at about 11:30 a.m at that time the accused who was earlier residing with them as neighbour had threatened her and took her away to a lone place nearby a chhapra and raped her forcibly. The whole incident was narrated in the complaint.

4. The complainant's son thereafter called his uncle, namely, Babaji and said the fact. The complainant and his son went to lodge a complaint in Police Station and the complaint has been registered being Crime Register No.96 of 1997 for an offence punishable under Sections-376 and 506(2) of the IPC.

5. Pursuant to the registration of FIR, investigation was put into motion. During the course of investigation, statements of the witnesses were recorded, panchnama of the scene of offence was prepared, clothes of the accused as well as victim were also recovered

by drawing a panchnama, which were sent to F.S.L. for chemical analysis. After obtaining F.S.L. Report and the certificate issued by the Doctor and also obtaining the evidence of the birth of the victim, since sufficient incriminating evidence was found against the accused, he was charge-sheeted in the Court of learned Judicial Magistrate First Class at Mehsana.

6. As the offence under Sections-376 and 506(2) of the IPC was exclusively triable by the court of Sessions, learned JMFC, Mehsana committed the case to the Sessions Court, Mehsana. The learned Sessions Judge, Mehsana to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable under Sections-376 and 506(2) of IPC. The charge was read over and explained to the accused as the accused pleaded not guilty to the charge. He was put to trial and tried by the learned

Sessions Judge, Mehsana in Sessions Case No. 229 of 1997.

7. To prove the culpability of the accused, prosecution has in all examined as many as 9 witnesses, details of which are given in paragraph 5 of the impugned judgment. These witnesses are as under :-

Sr.No.	Exhibit	Particulars
1	10	Dr.Somabhai Hargovanbhai Patel -Medical Officer.
2	17	Dr.Kantilal Ishwardas Patel – Medical Officer.
3	19	Thakor Raichandji Sardarji – complainant - father of the victim girl.
4	21	Daughter of Raichandji – the victim girl.
5	22	Parmar Ayubbhai Gafurbhai – Panch witness.
6	25	Goshwani Navingiri Chimangiri – Panch witness.
7	28	Jivabhai Motibhai – P.S.O
8	31	Prajapati Sevantibhai Gordhanbhai – Panch witness.
9	35	K.M. Raval – P.S.I and Investigating Officer.

8. The prosecution has also produced as many as 19 documents and relied upon the contents

thereof. The details of which enumerated in para-6 of the impugned judgment and order are as under :-

Sr.No.	Exhibit	Nature of evidence
1	11	Police Yadi for medical examination of the victim girl.
2	12	Medical Certificate of the victim girl.
3	13	Report of the radiologist.
4	14 to 16	Three X-ray plates.
5	18	Medical Certificate of the accused.
6	20	Complaint.
7	23	Panchnama of cloth of the victim girl.
8	24	Panchnama of the person of the victim girl.
9	26	Panchanama of the person of the accused.
10	27	Slip duly signed by the panchas issued while recovery of the pant of the accused.
11	29	Deputation order.
12	30	Yadi issued while sending the victim girl to the hospital.
13	32	Panchnama of the scene of offence.
14	36	Yadi issued while sending the accused to the hospital.
15	37	Ravangi note of muddamal articles.
16	38	Receipt issued for FSL while receiving muddamal articles.
17	39	FSL report.
18	40	Serological report of FSL.
19	43	Two photographs showing the accused as well as victim girl.

9. After recording of the evidence of the prosecution witnesses was over, the learned Sessions Judge, Mehsana explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution by reiterating that he has been falsely implicated. In his further statement the appellant – accused has stated that the victim girl used to meet him frequently. However, the father of the victim girl did not like it and he was insisting that the accsued should vacate the hut immediately and because of that there was frequent quarrel among them. He has further stated that the victim girl has asked him to come to her place and see took him to the nearby vacant hut. They were sitting there. The peoples residing in the surrounding huts came together and hence false complaint was

filed against him. He has also produced two photographs showing the accused as well as the victim girl together which were exhibited at Ex.43 to the proceeding before the trial Court.

10. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Sessions Judge, Mehsana has held that the victim girl was subjected to rape by the accused and the prosecution has established that the charge levelled against the accused was proved beyond reasonable doubt and, therefore, the accused was held guilty of the offence of committing rape and, therefore, he was convicted of the offence under Sections-376 and 506(2) of the Indian Penal Code.

11. Thereafter, the learned Sessions Judge, Mehsana heard the accused and his advocate

on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, the accused was sentenced for an offence under section 376 of the Code with R.I. of 10 years and fine of Rs.3000/- and in default thereof, to undergo further S.I. of one year. The accused was also punished with an offence under Section-506(2) of the IPC and was sentenced with R.I of 1 year and fine of Rs.1500/- and in default thereof to undergo S.I of 6 months. The learned Judge has passed an order to undergo the aforesaid sentences concurrently.

12. Being aggrieved by the judgment and order, the accused has filed this appeal.

13. Mr.Chirag B. Patel, learned advocate appearing for Mr.B.S.Patel, for the appellant has taken us through the oral as well as documentary evidence which are on record and

also assailed the judgment and order of the learned Additional Sessions Judge, Mehsana. He has submitted that the learned Additional Sessions Judge has erred in convicting the appellant – accused though there is no sufficient evidence showing his guilt in the matter. He has further submitted that the Learned Additional Sessions Judge has failed to appreciate that the appellant is innocent and has not committed the alleged offence. The victim girl was a consenting party and out of her own free will and desire the alleged incident was taken place. He has further submitted that the submissions made on behalf of the appellant – accused were not considered by the learned Additional Sessions Judge, in their proper perspective. The impugned judgment and order is based on mere conjuncture and presumption. He has further submitted that there are several contradictions in the evidence of the prosecution which has resulted into the

miscarriage of justice. There were certain improbabilities in the case of the prosecution which were clearly pointed out by the appellant – accused and still the same have not been considered by the learned Additional Sessions Judge. He has further submitted that the opinion of the Medical Officer at Ex.12 clearly shows that there was no mark of injury detected on the external body of victim either on face, neck, chest, breast, abdomen, external genital and thigh. There was no external mark of injury over private part of the victim girl. Even the opinion given by the Medical Officer was not considered by the learned Additional Sessions Judge who in term has stated that there was no recent sexual intercourse. It was also stated in the certificate that the victim girl was in the menstrual period of second day. Mr.Patel has further submitted that even the report of the Medical Officer at Ex.10 indicates that there was no abnormality

in the walking of the victim. It was also found that in her vagina two fingers easily could enter. It was also admitted that the radiologist report shows age of the victim which may differ by two years. It was also observed by the Medical Officer that the victim girl was in the habit of having regular intercourse. He has further submitted that the learned trial Judge has seriously erred in considering that the appellant had committed intercourse before the day of incident as stated at Ex.18. However, the medical opinion at Ex.10 clearly states that he was not able to give any opinion regarding the present or past intercourse by the appellant. He has further submitted that the Medical Officer has stated on oath at Ex.17 that no mark on body and no blood stains had been found in the examination of the victim. He has further submitted that an objection was raised by the learned advocate representing

the accused – appellant before the trial Court at Ex.35 against the serological report produced by the PSI in the cross-examination. He has further submitted that no independent witness was brought by the prosecution before the trial Court, though there was independent witness who could be brought before the Court. He has further submitted that in the further statement of the appellant – accused it was clearly stated that there was an old rivalry between the accused and the father of the victim girl and due to this, false complaint was filed against the appellant – accused. He has further submitted that despite the fact that the charge was filed against the appellant – accused disclosing the age of the victim girl as 16 years and still the learned Additional Sessions Judge has considered the age of the victim girl as 14 years. He has further submitted that even as per the case of the prosecution the appellant – accused disclosed before the

doctor regarding intercourse with a consent on the previous day of incident for which the appellant has never been prosecuted. He has further submitted that the evidence of the doctor clearly states that there can be plus or minus of 2 years difference in the age as per the report of the radiologist and the actual age and hence the benefit of doubt must be given to the appellant – accused. He has further submitted that the learned Additional Sessions Judge was misled by the presence of blood on the cloth of the victim girl which was because of the facts that she was in the cycle of menstrual as was indicated in the Medical Officer's report. He has further submitted that the brother of the victim girl who was present immediately after the alleged incident and yet he was not examined by the prosecution for which no reasons have been offered. He has further submitted that there was absolutely an improbability in the case of victim girl as

according to her the appellant – accused has shut her mouth by one hand and by second hand after taking out the pant he committed the rape on her and there was no mark of the injury even on the face of victim girl examined immediately after the incident. Mr.Patel has lastly submitted that the appellant – accused is a poor person and is the bread winner of family. He has already undergone the sentence of more than 6 years and if this Court is not inclined to give clean chit to the appellant – accused the maximum sentence awarded by the learned Additional Sessions Judge of 10 years may suitably be reduced. Since the appellant – accused has not given any threat to the victim girl, he was wrongly convicted for an offence punishable under Section-506(2) of IPC and hence sentence award for R.I of one year and fine of Rs.1500/- and in default thereof to undergo S.I of 6 months, may be deleted.

14. Mr. K.T.Dave, learned Additional Public Prosecutor appearing for the State, on the other hand, has supported the case of the prosecution and submitted that no interference is called for in the judgment and order of conviction passed by the Learned Trial Judge. No case is made out by the appellant to take any different view in the matter. He has submitted that the prosecution has examined Dr.Somabhai Hargovanbhai Patel Ex.10 and in his deposition the said doctor has stated that on 26.3.1997 at about 2:00 o'clock the victim girl was sent to him alongwith the police yadi at Ex.11 and as per his deposition the victim girl has started menstrual period 1 year back. As per the opinion of the radiologist the victim girl was aged about 15 to 16 years on the date of incident. The father of the victim girl, namely, Raichandji

was examined at Ex.11. He has stated on oath that the age of the victim girl was about 16 years. The victim girl was examined at Ex.21 and she has also stated her age at about 16 years. From this evidence the learned trial Judge has come to the conclusion that the victim girl was minor on the date of the incident. He has further submitted that since the victim girl was below the age of 16 years it is immaterial as to whether she has given her consent or not. No evidence was brought on record with regard to the alleged consent given by the victim girl. Simply because the photographs are produced it would not prove beyond any reasonable doubt that the appellant – accused has committed sexual intercourse with the victim girl with her consent. He has further submitted that having considered the panchnama of the scene of offence, evidence of the complainant at Ex.19 as well as evidence of the victim girl at Ex.21 it becomes clear that the hut where

the alleged incident took place was absolutely vacant place and the accused – appellant has taken the advantage of her loneliness and after giving threat and putting his hand on the mouth of the victim girl he has committed rape with the victim girl. He has, therefore, submitted that the victim girl was minor below the age of 16 years at the time of incident and this fact is proved and charge regarding rape was also proved on the basis of F.S.L report produced by the prosecution. He has further submitted that the Learned Trial Judge has rightly convicted the accused for the offence committed by him and no interference is called for by this Court especially when a well-reasoned order has been passed by the learned trial Judge considering all the aspects of the matter. He has, therefore, submitted that the appeal filed by the appellant – accused deserves to be dismissed.

15. We have considered the submissions advanced by Mr.Chirag B. Patel, learned advocate appearing for the appellant and Mr.K.T.Dave, learned Additional Public Prosecutor appearing for the respondent – State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned trial Judge has recorded a just and correct conclusion holding the accused guilty, we may first advert to the oral evidence led by prosecution.

16. P.W. 1 – Dr. Somabhai Hargovandas Patel in his deposition at Exh. 10 has stated that the victim girl was taken to the hospital on 26.03.1997 at about 2 O'clock in the afternoon. She has stated that she was raped. She was fully conscious. She has changed all other clothes except chaniya on which blood stains were found. There were no external injury marks on her face, neck, chest, breast, abdomen or external genital. She was well built and fully nourished. Her walk was quite normal. No heirs were present in her maxilla. Pubic heirs were present and the same were meted with blood (menstrual). There was no external mark of injury over private parts. Her hymen was torn and ruptured (old). Her vagina admits two fingers easily. Her vaginal and urinal swaps were taken, examined and nothing was found. The opinion of the Radiologist was taken and as per the said opinion, her age was between 15 to 16 years. It was not possible to give

any opinion with regard to the recent sexual inter-course. In his cross-examination, he has admitted that there was difference of about 2 years in the actual age and the age determined as per the Radiologist opinion. He has further confirmed that the victim girl was habituated to the sexual inter-course.

17. P.W. 2 – Dr. Kantilal I. Patel, Exh. 17 has deposed that on 29.03.1987, he was working as Medical Officer in Mehsana Civil Hospital. The accused was taken to the Hospital for his medical check-up with history of rape. His body was strongly built up. There was no external mark of injury on his body and no blood stains were found on his clothes or any part of his body. As per the say of the accused, he has committed rape with the victim girl as per her consent on the previous day. There was no white substance found on his private part. He has

also admitted that it is difficult to give any opinion as to whether he has committed rape very recently. He has given his opinion from the examination of the accused that he was competent for sexual inter-course.

18. P.W. 3 – Thakore Raichand Sardarji at Exh. 19 is the father of the victim girl. He has deposed that when he and his son Chaheraji have come to the house at about 12.30 in the noon for lunch, his daughter-in-law Bhikhiben has told him that the victim girl was not in the house till she came. Hence, he and his son both have gone out in search of the victim girl and during their search they have found that there was noise coming from the adjoining hut. When they entered in the hut, the accused ran away after crossing the wall. The victim girl has thereafter told the entire story as to how the rape was committed with her. In his cross-examination, he has

stated that he and his son have tried to catch hold of the accused. However, he ran away. He has further stated that the accused was staying in the nearby hut for about one year and he was staying with his wife and children. He has denied the fact that his daughter used to go every now and then. He has further denied the fact that he did not like that his daughter used to go to the accused house every now and then and since he did not like it, he filed false complaint against the accused.

19. P.W. 4 is the victim girl who was examined at Exh. 21. She has stated in her examination-in-chief that the accused had committed rape. She tried to shout. However, the accused has put his hand on her mouth and hence, she could not shout. She has further stated that as soon as her father and brother entered in the hut, the accused has run away.

In her cross-examination, she denied that she did not object to the act of rape committed by the accused. She has further stated that the accused has given her threat of killing her. She has denied that no threat was given to her nor that she has not resisted. She has expressed her ignorance about the alleged quarrel of the accused with her father. She has also denied that she has willingly entered into sexual inter-course with the accused. She has also denied that except the accused, she has committed sexual inter-course with anyone else.

20. P.W. 5 – Ayub Gafoor was examined at Exh. 22. He is the punch witness and supported the case of the prosecution. P.W. 6 – Navingiri C. Goswami is also a panch witness and he was examined at Exh. 25. He turned hostile. P.W. 7 – Jivabhai Motibhai – Exh. 28 is ASI at Satlasana Police Station. He

has registered the complaint and sent the victim girl for medical check-up along with the police yadi. P.W. 8 – Sevanti Gordhan Prajapati – Exh. 31 is also a panch witness. He turned hostile. P.W. 9 – Kanuprasad M. Raval – Exh. 35 is P.S.I., Mehsana City Police Station. He has investigated the crime. He has drawn the panchnama as per the say of the witnesses. He has also recorded the statement of the witness Bhikhiben, Chaheraji, Raisingji and other neighbors. He has also recorded the statement of the victim girl on 27.03.1997. The clothes of the victim girl were seized in presence of the witnesses and the panchas. He has also recorded the statement of the accused and sent him for medical check-up at Civil Hospital, Mehsana. The muddamal articles were sent for chemical analysis to Forensic Science Laboratory. In his cross-examination, he has stated that he has recorded the statements of the neighbours who

are residing in the huts. However, they did not know anything about the commission of rape with the victim girl and hence, they were not cited as witnesses. He has also stated in his cross-examination that the neighbors have denied the incident of commission of rape and hence, their names were not mentioned in the charge-sheet.

21. FSL Report was produced at Exh. 39 which says that the blood stain and semen were found on the chaniya. Except this, on no other muddamal articles, blood stains and the semen were found. The group of blood could not be determined.

22. In view of the aforesaid evidence, according to this Court, it is duly proved that the victim girl who was aged about 15 to 17 years on the date of the incident was raped and the oral testimony of the victim

girl which is unimpeachable is sufficient to establish the charge of rape levelled against the accused. Moreover, the medical evidence of both the Doctors as well as F.S.L. Report corroborate the charge levelled against the accused. It is settled principle of law that conviction can be based on oral testimony of the victim girl without insisting for corroboration if the same inspires confidence. There is no reason for this Court to disbelieve the evidence of the victim girl, who is aged about 15 to 17 years. The argument of the defence counsel that the father of the victim girl did not like the relations between accused and the victim girl has no foundation at all. In view of the evidence led by prosecution to prove the charge against the accused beyond reasonable doubt, more particularly, testimony of the victim girl along with medical certificates and F.S.L. Report, we are of the view that the accused has

committed an offence under Section-376 of the Indian Penal Code.

23. After having held that the conviction recorded against the appellant accused under Section-376 of IPC has to be confirmed and maintained, the next question which falls for determination of this Court is as to what sentence should be imposed upon the accused. The Learned Trial Judge has imposed sentence of 10 years under Section 376 of IPC. However, looking to the facts found and evidence came on record, it appears to us that the sentence awarded is disproportionate to the offence committed by the accused. The appellant – accused cannot solely be held responsible for commission of such offence. The element of consent cannot be ruled out in the present case. It has come on record that the appellant – accused and the family of the victim girl were staying in the nearby hut.

Possibly they might be liking to each other and were fallen in love with each other. The victim girl might have invited the appellant to her house and taken him to the adjoining hut. It is only when the father and the brother of the victim girl have seen them in the adjoining hut she might have concocted the story that the accused had committed rape with her.

24. Even there are lot of controversies about the age of the victim girl. On careful consideration and proper appreciation of the evidence led by the prosecution, it appears to the Court that there are lot of contradictions about the age of the victim girl. As per the evidence of the victim girl herself as well as evidence of the father of the victim girl, the victim girl was of 16 years age. Radiologist's report confirmed that she might be of 15 to 17 years of age.

It has also come in evidence that the victim girl was habituated to sexual intercourse and there was old ruptured of hymen. The ossification test was carried out and as per the said test age of the victim girl was found to be 15 to 17 years. There is no other independent evidence with regard to the age of the victim girl. It has also come in evidence that on the date of the incident the victim girl was having a period of menstrual and hence the alleged blood stains which were found on the cloth of the victim girl were due to the said menstrual period. From this evidence it cannot conclusively be proved that the said blood stains were found as a result of the sexual intercourse.

25. When there are serious disputes about the age of the victim girl and her conduct itself raises a suspicion as to whether the rape was committed against her will, the conviction itself is sometimes not held to be justified.

With regard to determination of age of the victim girl, it is worthwhile to refer to the observations made by the Hon'ble Supreme Court in the case of **Ram Murti V/s. State of Haryana, AIR 1970 S.C. 1020**. It is observed therein that in cases under Sections 366 and 376, age of prosecutrix is always of importance, particularly so where according to medical evidence, she was found to have been used to sexual intercourse and there was old rupture of hymen. Where the accused is sought to be acquitted of offence under Section 376, the Court should examine the question of age more closely. In the case before the Hon'ble Supreme Court, an unproved and unexhibited school certificate was relied on. The Court took the view that there is no trust-worthy evidence on record on which the conclusion that prosecutrix was under 18 years of age on the date of incident, can safely be founded. In the present case, no school living certificate or certificate

regarding registration of birth has come on evidence. The evidence has come in the form of deposition of the father of the victim girl as well as victim girl herself who have stated that the victim girl was of 16 years old. If we accept the medical evidence which says that the victim girl was between the age of 15 to 17 years old, in that case, one can safely believe that she must be above 16 years and then the consent plays an important role.

26. In the case of **Jinish Lal Sha V/s. State of Bihar, 2003 AIR SCW 74**, the charge against the accused was for kidnapping woman to compel her to marry and for rape. Sequence of events showed that prosecutrix accompanied accused willingly. Father of the prosecutrix stated in the FIR that prosecutrix went away by taking clothes and gold chain and some cash showing that there was no threat or inducement. The Court, therefore, held that

accused was not liable to be guilty under Section-366 or 376 in absence of proper appreciation of evidence in regard to consent of prosecutrix which is mandatory requirement before finding a person guilty under Section 366 or 376 of IPC. In the present case, the victim girl and the appellant – accused were found in the adjoining hut. There was no resistance or any mark of injury on any part of the body of the victim girl. Since the parents of the victim girl did not agree for the reasons best known to them, their relation could not be lasted longer and the complaint was filed against the appellant – accused.

27. In the above view of the matter, even if we accept the version of the prosecution for the purpose of convicting the accused, looking to the conduct of the victim girl, her deposition, medical evidence, lack of adequate evidence regarding the age, we

cannot confirm the sentence as awarded by the Learned Trial Judge and the same is required to be altered.

28. In view of the above facts and circumstances of the case and the discussion made, we are of the view that the interest of justice would better be served if the appellant – accused is awarded sentence for an offence under Section-376 of the IPC to the extent of sentence undergone by him, looking to the peculiar facts and circumstances of this case and it shall not be considered as precedent. Since the consent of the victim girl cannot be ruled out looking to the facts of the case, no offence under Section-506(2) of the Code is proved against the appellant – accused and hence conviction and sentence awarded by the learned trial Judge for the commission of an offence under Section-506(2) is hereby deleted. It has been stated at the bar by Mr.Patel, learned advocate appearing for the appellant – accused that the

appellant -accused has already undergone the sentence of more than 3 and half years as the appellant has undergone sentence from 29.03.1997 to 04.04.1997 at the pretrial stage and he was on bail from 04.04.1997 to 31.07.2001, the date on which the conviction order was passed. Though the appeal was filed in time, it came to be admitted on 31.09.2004 and bail was granted on 11.10.2004. The appellant – accused is on bail since then.

29. In the above view of the matter, the sentence awarded by the learned trial Judge for the commission of an offence punishable under Section-376 of the IPC is modified to the extent of the sentence undergone by the appellant – accused. While arriving at this conclusion, we found sufficient force in the submissions of learned advocate Mr. Patel made on behalf of the appellant – accused and we have assigned reasons for awarding sentence lesser than the minimum prescribed

under the Indian Penal Code. No sentence is awarded for an offence punishable under Section-506(2) of the Code as the said offence is not proved by the prosecution, more particularly, because of the view which we have taken hereinabove. Since the appellant – accused is on bail and he was awarded the sentence for an offence punishable under Section 376 of the IPC to the extent of the sentence undergone by him and since he is acquitted from the offence punishable under Section 506 (2) of the IPC, the bail bonds furnished by the appellant – accused at the time of his enlargement on bail, stands cancelled.

30. With the foregoing reasons, the appeal succeeds partly and is accordingly partly allowed. Direct Service is permitted.

[A. M. KAPADIA, J.]

[K.A. PUJ, J.]

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